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1 proceedings. The Commissioner then filed a Response to the Supplemental Brief on  
2 August 19, 2014, and plaintiff filed a Reply thereto on September 9, 2014. Thus, this  
3 matter now is ready for decision.<sup>1</sup>

#### 4 5 **DISPUTED ISSUES**

6 The disputed issues that plaintiff originally raised in the Joint Stipulation as  
7 grounds for reversal under Sentence Four of 42 U.S.C. § 405(g) are as follows:

8 1. Whether the Administrative Law Judge (“ALJ”) made a  
9 proper step three determination.

10 2. Whether the ALJ properly determined plaintiff’s past  
11 relevant work and residual functional capacity (“RFC”).

12 3. Whether the ALJ made a proper adverse credibility  
13 determination.

14  
15 The additional disputed issues that the Court construed plaintiff’s  
16 Supplemental Brief as raising (hereinafter the “Sentence Six issues”) are as follows:

17 4. Whether the Court even has the authority to remand for  
18 payment of benefits based on plaintiff’s “newly discovered” evidence of  
19 the subsequent award of benefits.

20 5. Whether plaintiff’s “newly discovered” evidence of the  
21 subsequent award of benefits may even be considered by the Court for  
22 purposes of its determination whether the ALJ erred in any of the  
23 respects alleged by plaintiff in the Joint Stipulation.

24 6. Whether plaintiff’s “newly discovered” evidence of the  
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27 <sup>1</sup> In accordance with Rule 12(c) of the Federal Rules of Civil Procedure,  
28 the Court has determined which party is entitled to judgment under the standards set  
forth in 42 U.S.C. § 405(g).

subsequent award of benefits satisfies the standard for Sentence Six remand for further administrative proceedings under the Ninth Circuit's rationale in Luna v. Astrue, 623 F.3d 1032 (9th Cir. 2010) and this Court's rationale in West v. Colvin, 2014 WL 2511296 (C.D. Cal. June 3, 2014).

7. Whether, even if plaintiff's "newly discovered" evidence of the subsequent award does not satisfy the standard for a Sentence Six remand for further administrative proceedings, it still "triggers the Commissioner's duty to further develop the record here," as contended by plaintiff.

8. Whether, if the case is remanded, the Court should affirm the grant of benefits in plaintiff's subsequent application and limit the scope of the remand to only the time leading up to the favorable determination in the Second Claim, as requested by plaintiff.

## DISCUSSION

As discussed hereafter, the Court finds that reversal is warranted only with respect to the second part of Disputed Issue Two concerning whether the ALJ properly considered the treating physician's opinion.

### **I. The Sentence Six issues (Disputed Issues Four to Eight).**

Pursuant to Sentence Six of 42 U.S.C. § 405(g), the Court has jurisdiction to remand the case to the Commissioner for the consideration of new evidence, but "only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding." See also, e.g., Allen v. Secretary of Health & Human Servs., 726 F.2d 1470, 1473 (9th Cir. 1984).

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1 Disputed Issue Four is whether the Court even has the authority to remand for  
 2 payment of benefits based on plaintiff's "newly discovered" evidence of the  
 3 subsequent award of benefits. (See Supp. Br. at 1.) For the reasons stated by the  
 4 Commissioner (see Response at 3), the Court concurs with the Commissioner that it  
 5 does not. See also Melkonyan v. Sullivan, 501 U.S. 89, 98, 111 S. Ct. 2157, 115 L.  
 6 Ed. 2d 78 (1991) (noting that, under Sentence Six, the Court "does not affirm,  
 7 modify, or reverse the [Commissioner's] decision; it does not rule in any way as to  
 8 the correctness of the administrative determination"); Faucher v. Secretary of Health  
 9 and Human Services, 17 F.3d 171, 173 (6th Cir. 1994) (district court erred in  
 10 awarding benefits after purporting to apply the requirements of Sentence Six). The  
 11 Court further notes that the only legal authority cited by plaintiff to support his  
 12 position are cases that addressed the issue of remand for payment of benefits under  
 13 Sentence Four. (See Reply at 1-2.)<sup>2</sup>

14 Disputed Issue Five is whether plaintiff's "newly discovered" evidence of the  
 15 subsequent award of benefits may even be considered by the Court for purposes of  
 16 its determination whether the ALJ erred in any of the respects alleged by plaintiff in  
 17 the Joint Stipulation. (See Supp. Br. at 3.) For the reasons stated by the  
 18 Commissioner (see Response at 7), the Court concurs with the Commissioner that it  
 19 may not. See also Melkonyan, 501 U.S. at 98; Allen v. Commissioner of Social Sec.,  
 20 561 F.3d 656, 653 (6th Cir. 2009) (noting that to the extent a subsequent favorable  
 21 decision could constitute "new evidence" under Sentence Six, it "is not meant to  
 22 address the correctness of the administrative determination made on the evidence  
 23 already before the initial ALJ").

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24  
 25 <sup>2</sup> Although plaintiff cites Luna in support of his position that the Court has  
 26 authority to remand for payment of benefits under Sentence Six (see Reply at 1-2),  
 27 the Court notes that Luna involved issues under both Sentence Six and Sentence  
 28 Four, and that the issue of whether remand for payment of benefits was warranted  
 arose in that case only under Sentence Four. See Luna, 623 F.3d at 1035.

1 Disputed Issue Six is whether plaintiff's "newly discovered" evidence of the  
2 subsequent award of benefits satisfies the standard for Sentence Six remand for  
3 further administrative proceedings under the Ninth Circuit's rationale in Luna, 623  
4 F.3d 1032, and this Court's rationale in West, 2014 WL 2511296. (See Supp. Br. at  
5 4-5.) For the reasons stated by the Commissioner (see Response at 6-7), the Court  
6 concurs with the Commissioner that it does not. Here, in contrast to Luna and West,  
7 the subsequent award of benefits was based on different medical evidence and a  
8 different time period. See Bruton v. Massanari, 268 F.3d 824, 827 (9th Cir. 2001)  
9 (Sentence Six remand was not warranted where subsequent favorable decision  
10 involved "different medical evidence, a different time period, and a different age  
11 classification").

12 Disputed Issue Seven is whether, even if plaintiff's "newly discovered"  
13 evidence of the subsequent award does not satisfy the standard for a Sentence Six  
14 remand for further administrative proceedings, it still "triggers the Commissioner's  
15 duty to further develop the record here," as contended by plaintiff. (See Supp. Br. at  
16 5-6.) For the reasons stated by the Commissioner (see Response at 9), the Court  
17 concurs with the Commissioner that it does not. See also Allen, 561 F.3d at 653 ("To  
18 the extent that Allen argues that remand is appropriate based on the *possibility* of new  
19 and material evidence, this contradicts the clear language of § 405(g).") (Emphasis  
20 in original); Travis v. Sullivan, 985 F.2d 919, 924-25 (7th Cir. 1993) (district court  
21 erred in ordering "brand new" administrative proceeding on the basis of "new and  
22 material evidence").

23 Disputed Issue Eight is whether, if the case is remanded, the Court should  
24 affirm the grant of benefits in plaintiff's subsequent application and limit the scope  
25 of the remand to only the time leading up to the favorable determination in the  
26 Second Claim, as requested by plaintiff. (See Supp. Br. at 6.) For the reasons stated  
27 by the Commissioner (see Response at 3-4), the Court concurs with the  
28 Commissioner that it may not affirm the subsequent grant of benefits because the

correctness of that award is not before the Court. See also Baker on Behalf of Baker v. Sullivan, 880 F.2d 319, 321 (11th Cir. 1989) (“[T]he district court had no jurisdiction over the 1985 award when it remanded the case for reconsideration of the 1979 claim. No appeal from that claim had been taken to the district court.”); Encarnacion v. Astrue, 724 F. Supp. 2d 243, 245 (D. P.R.) (“The court lacks jurisdiction over the subsequent award of benefits because no appeal from that claim has been taken to the district court.”). However, in view of the Commissioner’s position that the relevant time period for purposes of the Court’s review is from March 15, 2011 (the filing date of plaintiff’s first SSI application) to September 26, 2012 (the date of the ALJ’s decision) (see Response at 3-4), the scope of the remand hereafter ordered shall be confined to that closed period.

## **II. The ALJ’s adverse credibility determination (Disputed Issue Three).**

Disputed Issue Three is directed to the ALJ’s adverse credibility determination with respect to plaintiff’s subjective symptom testimony. (See Jt Stip at 20-23.)

An ALJ’s assessment of pain severity and claimant credibility is entitled to “great weight.” See Weetman v. Sullivan, 877 F.2d 20, 22 (9th Cir. 1989); Nyman v. Heckler, 779 F.2d 528, 531 (9th Cir. 1986). Under the “Cotton standard,” where the claimant has produced objective medical evidence of an impairment which could reasonably be expected to produce some degree of pain and/or other symptoms, and the record is devoid of any affirmative evidence of malingering, the ALJ may reject the claimant’s testimony regarding the severity of the claimant’s pain and/or other symptoms only if the ALJ makes specific findings stating clear and convincing reasons for doing so. See Cotton v. Bowen, 799 F.2d 1403, 1407 (9th Cir. 1986); see also Smolen v. Chater, 80 F.3d 1273, 1281 (9th Cir. 1996); Dodrill v. Shalala, 12 F.3d 915, 918 (9th Cir. 1993); Bunnell v. Sullivan, 947 F.2d 341, 343 (9th Cir. 1991).

Here, plaintiff testified that he is unable to work because of vision problems caused by cataracts and hand problems caused by rheumatoid arthritis. (See AR 46.)

1 Plaintiff also testified that he becomes tired quickly, that he has sleeping problems,  
2 and that he sometimes needs his wife's help to get around in public. (See AR 48-49.)  
3 The ALJ determined that, although plaintiff's medically determinable impairments  
4 could reasonably be expected to cause the alleged symptoms, plaintiff's statements  
5 concerning the intensity, persistence, and limiting effects of these symptoms were not  
6 credible to the extent they were inconsistent with the ALJ's RFC determination. (See  
7 AR 26.)

8 In support of this adverse credibility determination, the sole reason proffered  
9 by the ALJ was that plaintiff's daily activities "have, at least at times, been somewhat  
10 greater than [plaintiff] has generally reported." (See AR 26.) The ALJ specifically  
11 explained that plaintiff had admitted to working between one and three days per week  
12 for eight hours at a time, work that did not constitute substantial gainful activity but  
13 nonetheless reflected adversely on plaintiff's credibility. (See AR 25-26; see also AR  
14 42.) The Court finds that this was a legally sufficient reason on which the ALJ could  
15 properly rely in support of his adverse credibility determination. Evidence that  
16 plaintiff engaged in some part-time work belied his testimony about the severity of  
17 his symptoms, even if that work did not constitute substantial gainful activity. See  
18 20 C.F.R. § 416.971 ("Even if the work you have done was not substantial gainful  
19 activity, it may show that you are able to do more work than you actually did."); Bray  
20 v. Commissioner of Social Security Admin., 554 F.3d 1219, 1227 (9th Cir. 2009)  
21 (claimant's part-time work as personal caregiver belied claimant's claim of  
22 debilitating respiratory illness). Moreover, as a general matter, it is well-settled that  
23 an ALJ may rely on inconsistencies between the level of a claimant's self-reported  
24 daily activities and the severity of his symptoms portrayed by his subjective symptom  
25 testimony. See Molina v. Astrue, 674 F.3d 1104, 1113 (9th Cir. 2012); Berry v.  
26 Astrue, 622 F.3d 1228, 1234-35 (9th Cir. 2010); Valentine v. Commissioner Social  
27 Sec. Admin., 574 F.3d 685, 693 (9th Cir. 2009); Orn v. Astrue, 495 F.3d 625, 639  
28 (9th Cir. 2007).

### 1 **III. The ALJ's step three determination (Disputed Issue One).**

2 Disputed Issue One is directed to the ALJ's determination at step three of the  
3 Commissioner's sequential evaluation process that plaintiff did not have an  
4 impairment that met or equaled the requirements of a listed impairment. (See Jt Stip  
5 at 3.)

6 At step three of the Commissioner's sequential evaluation process, the ALJ  
7 must determine whether a claimant's impairment or combination of impairments  
8 meets or equals a listed impairment set out in 20 C.F.R. Part 404, Subpart P,  
9 Appendix 1. See Tackett v. Apfel, 180 F.3d 1094, 1099 (9th Cir. 1999). To "meet"  
10 a listed impairment, the claimant must establish that he satisfies each element of the  
11 listed impairment in question. See Sullivan v. Zebley, 493 U.S. 521, 530, 110 S. Ct.  
12 885, 107 L. Ed. 2d 967 (1990); Tackett, 180 F.3d at 1099. To "equal" a listed  
13 impairment, a plaintiff "must establish symptoms, signs, and laboratory findings 'at  
14 least equal in severity and duration' to the characteristics of a relevant listed  
15 impairment, or, if a claimant's impairment is not listed, then to the listed impairment  
16 'most like' the claimant's impairment." Tackett, 180 F.3d at 1099 (quoting 20 C.F.R.  
17 § 404.1526).

18 Here, plaintiff highlights the following four listed impairments: 2.02 (Loss of  
19 central visual acuity), 2.03 (Contraction of the visual field in the better eye), 5.05  
20 (Chronic liver disease), and 14.06 (Inflammatory arthritis). (See Jt Stip at 3.) As  
21 discussed below, the Court rejects all of plaintiff's arguments directed to the ALJ's  
22 step three determination.

#### 23 24 A. Whether the ALJ properly determined that plaintiff did not **meet** the 25 requirements of a listed impairment.

26 The only listed impairment whose requirements that plaintiff argues are met is  
27 Listing 2.02 (Loss of central visual acuity). (See Jt Stip at 3.) Listing 2.02 requires  
28 evidence that "remaining vision in the better eye after best correction is 20/200 or

1 less.”

2 Here, the ALJ expressly found that plaintiff did not meet the requirements of  
3 Listing 2.02 and referenced evidence that plaintiff’s corrected vision was 20/100  
4 bilaterally. (See AR 24, 29.) Plaintiff points to other evidence that his vision also  
5 was measured at 20/200 bilaterally. (See Jt Stip at 3; see also AR 294, 295.)  
6 However, the evidence cited by plaintiff described his vision “without glasses.” (See  
7 AR 295.) This evidence fails to satisfy the requirements of Listing 2.02, which  
8 requires evidence of vision “after best correction.”<sup>3</sup>

9  
10 B. Whether the ALJ properly determined that plaintiff did not **equal** the  
11 requirements of a listed impairment.

12 Plaintiff does not attempt to show how he equals the requirements of any of the  
13 four listed impairments that he specified, but plaintiff merely contends that the ALJ  
14 erred under SSR 96-6p by failing to call a medical expert during the administrative  
15 hearing “to testify regarding the equivalency standard.” (See Jt Stip at 3, 9.)

16 As a threshold matter, the Court rejects plaintiff’s challenge to the ALJ’s  
17 equivalency determination in light of plaintiff’s utter failure to present any evidence  
18 or plausible theory of equivalency. See Burch v. Barnhart, 400 F.3d 676, 683 (9th  
19 Cir. 2005) (“An ALJ is not required to discuss the combined effects of a claimant’s  
20 impairments or compare them to any listing in an equivalency determination, unless  
21 the claimant presents evidence in an effort to establish equivalence.”); Lewis v.  
22 Apfel, 236 F.3d 503, 514 (9th Cir. 2005) (ALJ’s failure to consider equivalence was

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24 <sup>3</sup> The Court notes that the evidence cited by plaintiff also reflected that  
25 plaintiff’s vision in his better (left) eye after “pinhole correction” was measured at  
26 20/200. (See AR 295.) However, this evidence also fails to satisfy the requirements  
27 of Listing 2.02 because the Commissioner’s regulations do not count pinhole testing  
28 as a measure of central visual acuity after best correction. See 20 C.F.R., Pt. 404,  
Subpt. P, App. 1, § 2.00(A)(5)(a)(iii).

1 not reversible error because the claimant did not offer any theory, plausible or  
2 otherwise, as to how his impairments combined to equal a listed impairment).

3 Moreover, the Court rejects plaintiff's contention that SSR 96-6p required the  
4 ALJ to call a medical expert at the administrative hearing to testify as to equivalency.  
5 SSR 96-6p does not contain such a specific requirement, but only provides that an  
6 ALJ may rely on the expert opinion of a State agency medical consultant on  
7 equivalence. See SSR 96-6p, 1996 WL 374180, at \*3. Here, the ALJ relied on the  
8 opinions of two State agency medical consultants who both opined that plaintiff was  
9 not disabled but capable of performing work at a medium exertional level. (See AR  
10 29; see also AR 297-305, 334-41.) Although SSR 96-6p does require an opinion  
11 from a medical expert in limited circumstances – when the ALJ opines that an  
12 existing case record suggests that a judgment of equivalence may be reasonable or  
13 that an updated case record may change the findings of the State agency medical  
14 consultants – such circumstances do not exist here.

15 Finally, as a general matter, the Court rejects plaintiff's argument that the ALJ  
16 should have collected additional medical evidence before making his equivalency  
17 determination. In Lewis, 236 F.3d at 514-15, the Ninth Circuit rejected the argument  
18 that an ALJ had a duty to gather additional medical evidence before making an  
19 equivalency determination where (1) the ALJ did not indicate that he found the record  
20 insufficient to properly evaluate the evidence; and (2) the evidence did not  
21 consistently favor a finding of disability under a listing. Here, likewise, the ALJ did  
22 not indicate that he found the record insufficient to properly evaluate the evidence;  
23 nor did the evidence consistently favor a finding of disability under any of the listed  
24 impairments specified by plaintiff.

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26 **IV. The ALJ's step four determination (Disputed Issue Two).**

27 Although Disputed Issue Two is framed as a challenge to the ALJ's RFC  
28 determination for purposes of his step four determination, it also encompasses a

1 challenge to the ALJ's determination as to plaintiff's past relevant work. (See Jt Stip  
 2 at 11-20.) As discussed below, the Court concurs with plaintiff only with respect to  
 3 the ALJ's RFC determination.

4  
 5 A. Whether the ALJ properly determined that plaintiff had past relevant  
 6 work.

7 "Past relevant work" is work that a claimant has done in the past 15 years, that  
 8 was substantial gainful activity, and that lasted long enough for a claimant to learn  
 9 to do it. See 20 C.F.R. § 416.960(b). "Substantial gainful activity" is work activity  
 10 that "involves doing significant physical or mental activities" on a full or part-time  
 11 basis and is the "kind of work usually done for pay or profit, whether or not a profit  
 12 is realized." See 20 C.F.R. § 416.972(a) and (b).

13 Here, the ALJ determined that plaintiff had engaged in substantial gainful  
 14 activity within the past 15 years: the jobs of kitchen steward, laundry sorter, and shoe  
 15 repairer. (See AR 30.)<sup>4</sup> Plaintiff points out that he earned almost no money in the  
 16 past 15 years because he performed these jobs while he was incarcerated. (See Jt Stip  
 17 at 11.) However, the Commissioner may point to substantial evidence, aside from  
 18 earnings, that a claimant has engaged in substantial gainful activity. See Lewis, 236  
 19 F.3d at 515. Factors to consider include the time spent working, the quality of a  
 20 person's performance, special conditions, and the possibility of self-employment. See  
 21 Katz v. Secretary of Health & Human Services, 972 F.2d 290, 293 (9th Cir. 1992).  
 22 Here, the record reflects that plaintiff's jobs while he was in prison involved working  
 23 five to eight hours per day and supervising other inmates while working in the  
 24 kitchen. (See AR 30; see also 45-46.) The Court finds this is substantial evidence  
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 27 <sup>4</sup> The ALJ also determined that plaintiff's past relevant work included the  
 28 job of brick laborer, but this job is not at issue because the ALJ eventually determined  
 that plaintiff could not perform it. (See AR 30.)

1 supporting the ALJ's determination that plaintiff had engaged in substantial gainful  
2 activity. See Keyes v. Sullivan, 894 F.2d 1053, 1056-57 (9th Cir. 1990) (work that  
3 was performed at church for 5.5 hours per day and that included supervision of other  
4 employees constituted substantial gainful activity).

5 Plaintiff further argues that the ALJ should have considered whether his  
6 incarceration was a "special condition" that precluded substantial gainful activity.  
7 (See It Stip at 11.) The Commissioner's regulations provide that if work is done  
8 under special conditions, the Commissioner may find that the work does not show a  
9 claimant is able to do substantial gainful activity. See 20 C.F.R. § 416.973(c). The  
10 special conditions are the following: (1) the claimant required and received special  
11 assistance from other employees in performing his work; (2) the claimant was  
12 allowed to work irregular hours or take frequent rest periods; (3) the claimant was  
13 provided with special equipment or was assigned work especially suited to his  
14 impairment; (4) the claimant was able to work only because of specially arranged  
15 circumstances, for example, other persons helped him prepare for or get to and from  
16 work; (5) the claimant was permitted to work at a lower standard of productivity or  
17 efficiency than other employees; and (6) the claimant was given the opportunity to  
18 work, despite his impairment, because of family relationship, past association with  
19 his employer, or his employer's concern for his welfare. See id. Here, the Court finds  
20 that plaintiff has failed to specify, much less show, how any of these conditions  
21 applied to him. Indeed, the record is devoid of any evidence that any special  
22 conditions were imposed on plaintiff's work while in prison. The Court also rejects  
23 plaintiff's unsupported implication that incarceration per se constitutes a special  
24 condition. See Struck v. Astrue, 2010 WL 1734855, at \*6 (W.D. Wash. Apr. 28,  
25 2010) (declining to consider unsupported allegation that jobs done while incarcerated  
26 do not qualify as past relevant work).

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1 B. Whether the ALJ properly determined plaintiff's residual functional  
 2 capacity.

3 The ALJ determined that plaintiff had an RFC for medium work with certain  
 4 limitations for plaintiff's vision problem. (See AR 24-25.)<sup>5</sup> Plaintiff contends that  
 5 the ALJ's RFC determination is erroneous because it failed to account for (1)  
 6 evidence of additional impairments and (2) the opinion of Dr. Boutros, plaintiff's  
 7 treating physician. (See Jt Stip at 12.) As discussed below, the Court concurs with  
 8 plaintiff only with respect to Dr. Boutros's opinion.

9  
 10 1. Evidence of additional impairments

11 Plaintiff contends that the ALJ failed to properly consider evidence that he has  
 12 cataracts and rheumatoid arthritis. (See Jt Stip at 12.) However, plaintiff has failed  
 13 to cite any evidence that these impairments imposed any functional limitations that  
 14 the ALJ failed to properly consider in making his RFC determination. Indeed,  
 15 plaintiff has not even specified what these functional limitations are. Accordingly,  
 16 the Court rejects plaintiff's contention that the ALJ's RFC determination was  
 17 erroneous simply because the record reflects that he has these conditions. See  
 18 Houghton v. Commissioner Social Sec. Admin., 493 Fed. Appx. 843, 845-46 (9th Cir.  
 19 2012) (now citable for its persuasive value per Ninth Circuit Rule 36-3) (ALJ was not  
 20 required to discuss conditions "in the absence of significant probative evidence that  
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22 <sup>5</sup> Specifically, the ALJ determined that plaintiff "can lift and/or carry 50  
 23 pounds occasionally and 25 frequently; he can stand and/or walk for six hours out of  
 24 an eight-hour workday with regular breaks; he can sit for six hours out of an eight-  
 25 hour workday with regular breaks; he is unable to read very small print; unable to  
 26 read ordinary news print or book print; unable to read a computer screen; restricted  
 27 from hazards such as unprotected heights and dangerous machinery, but is capable  
 28 of avoiding ordinary hazards in the workplace; the claimant may occasionally be  
 exposed to extreme cold and vibrations; the claimant's near acuity would be  
 frequent." (See AR 24-25.)

1 they had some functional impact on Houghton’s ability to work”); see also Morgan  
2 v. Comm’r of Soc. Sec., 169 F.3d 595, 601 (9th Cir. 1999) (ALJ properly discounted  
3 medical evidence of symptoms and characteristics where the record failed to “show  
4 how Morgan’s symptoms translate into specific functional deficits which preclude  
5 work activity” and physician “did not explain *how* these characteristics precluded  
6 work activity in Morgan’s case”) (emphasis in original).

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8 **2. Dr. Boutros’s opinion**

9 Dr. Boutros, plaintiff’s treating physician, submitted an opinion describing  
10 plaintiff’s ability to work in light of his untreated hepatitis C and kidney stones. (See  
11 AR 356-60.)

12 The law is well established in this Circuit that a treating physician’s opinions  
13 are entitled to special weight because a treating physician is employed to cure and has  
14 a greater opportunity to know and observe the patient as an individual. See  
15 McAllister v. Sullivan, 888 F.2d 599, 602 (9th Cir. 1989). “The treating physician’s  
16 opinion is not, however, necessarily conclusive as to either a physical condition or the  
17 ultimate issue of disability.” Magallanes v. Bowen, 881 F.2d 747, 751 (9th Cir.  
18 1989). The weight given a treating physician’s opinion depends on whether it is  
19 supported by sufficient medical data and is consistent with other evidence in the  
20 record. See 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). If the treating physician’s  
21 opinion is uncontroverted by another doctor, it may be rejected only for “clear and  
22 convincing” reasons. See Lester v. Chater, 81 F.3d 821, 830 (9th Cir. 1996); Baxter  
23 v. Sullivan, 923 F.3d 1391, 1396 (9th Cir. 1991). Where, as here, the treating  
24 physician’s opinion is controverted, it may be rejected only if the ALJ makes findings  
25 setting forth specific and legitimate reasons that are based on the substantial evidence  
26 of record. See, e.g., Reddick v. Chater, 157 F.3d 715, 725 (9th Cir. 1998) (“A  
27 treating physician’s opinion on disability, even if controverted, can be rejected only  
28 with specific and legitimate reasons supported by substantial evidence in the

1 record.”); Magallanes, 881 F.2d at 751; Winans v. Bowen, 853 F.2d 643, 647 (9th  
2 Cir. 1987).

3 Here, Dr. Boutros opined, inter alia, that plaintiff would be incapable of even  
4 “low stress” jobs, would be limited to two hours of standing or walking in an eight-  
5 hour workday, would sometimes need to take two to three unscheduled fifteen minute  
6 breaks, and would be limited to lifting less than ten pounds. (See AR 357, 358.)

7 The ALJ stated that he accorded “some weight” to Dr. Boutros’s opinion but  
8 effectively rejected it after citing what appear to be two reasons. (See AR 28-29.)  
9 First, the ALJ commented, “While Dr. Boutros does have a treating relationship with  
10 the claimant, the treatment history is quite brief.” (See AR 29.) The record here  
11 reflects that at the time Dr. Boutros rendered his opinion, he had been treating  
12 plaintiff for six months. (See AR 356, 360.) Assuming that the ALJ intended his  
13 comment that the treatment history was “quite brief” to serve as a reason to reject Dr.  
14 Boutros’s opinion, the Court finds that it was not legally sufficient. Although an ALJ  
15 may properly consider the length of treatment as a factor in weighing medical opinion  
16 evidence, see 20 C.F.R. § 416.927(c)(2)(i), the ALJ failed to specify how the factor  
17 applied here. See Regenitter v. Commissioner of Social Sec. Admin., 166 F.3d 1294,  
18 1299 (9th Cir. 1999) (“[C]onclusory reasons will not justify an ALJ’s rejection of a  
19 medical opinion.”).

20 Second, the ALJ noted that the “possibility always exists that a doctor may  
21 express an opinion in an effort to assist a patient with whom he or she sympathizes  
22 for one reason or another” and that claimants “can be quite insistent and demanding  
23 in seeking supportive notes or reports from their physicians.” (See AR 29.) The ALJ  
24 further noted that “[w]hile it is difficult to confirm the presence of such motives, they  
25 are more likely in situations where the opinion in question departs substantially from  
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the rest of the evidence in the record, as in the current case.” (See AR 29.)<sup>6</sup> But an ALJ may not presume that a claimant’s physician has been improperly influenced in the absence of evidence of “actual improprieties” that undermine the credibility of the physician’s opinion. See Nguyen v. Chater, 100 F.3d 1462, 1464 (9th Cir. 1996); Saelee v. Chater, 94 F.3d 520, 523 (9th Cir. 1996) (per curiam). Here, the ALJ proffered no supporting evidence of actual improprieties in Dr. Boutros’s opinion, a point which the Commissioner concedes. (See Jt Stip at 16.) Moreover, the ALJ’s implication that Dr. Boutros was improperly influenced merely because of the difference between his opinion and other evidence is purely speculative. Accordingly, the Court finds that this was not a legally sufficient reason on which the ALJ could properly rely to reject Dr. Boutros’s opinion. See Taylor v. Commissioner of Social Sec. Admin., 659 F.3d 1228, 1234 (9th Cir. 2011) (ALJ failed to provide legally sufficient reasons to reject physicians’ opinions when he merely rejected them as “pro-disability reporting” and “focused on being a disability advocate”).

### CONCLUSION AND ORDER

The law is well established that the decision whether to remand for further proceedings or simply to award benefits is within the discretion of the Court. See, e.g., Salvador v. Sullivan, 917 F.2d 13, 15 (9th Cir. 1990); McAllister, 888 F.2d at

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<sup>6</sup> The Commissioner contends that what the ALJ actually meant was that “the treatment record was sparse and that [Dr. Boutros’s] opinion departs substantially from the rest of the evidence of record” (see Jt Stip at 16), an interpretation which the Court finds unpersuasive because it fails to account for the full context of the ALJ’s reasoning. But even if the Commissioner’s interpretation of the ALJ’s reasoning were correct, such a conclusory reason still would not be a legally sufficient reason on which the ALJ could properly rely to reject Dr. Boutros’s opinion. See Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988) (“To say that medical opinions are not supported by sufficient objective findings or are contrary to the preponderant conclusions mandated by the objective findings does not achieve the level of specificity our prior cases have required.”)

603; Lewin v. Schweiker, 654 F.2d 631, 635 (9th Cir. 1981). Remand is warranted where additional administrative proceedings could remedy defects in the decision. See, e.g., Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir. 1984); Lewin, 654 F.2d at 635. Remand for the payment of benefits is appropriate where no useful purpose would be served by further administrative proceedings, Kornock v. Harris, 648 F.2d 525, 527 (9th Cir. 1980); where the record has been fully developed, Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); or where remand would unnecessarily delay the receipt of benefits, Bilby v. Schweiker, 762 F.2d 716, 719 (9th Cir. 1985).

The Court is mindful that, in Garrison v. Colvin, - F.3d -, 2014 WL 3397218, at \*19-21 (9th Cir. Jul. 14, 2014), a Ninth Circuit panel held that where an ALJ failed to properly reject treating medical opinion (and other evidence), it was appropriate to credit the evidence as true and remand the case for calculation and award of benefits. However, the Court also notes that after Garrison was decided, another Ninth Circuit panel did not apply or even acknowledge this “credit as true” rule where substantial evidence did not support an ALJ’s rejection of treating medical opinions and his adverse credibility determination; instead, the panel simply remanded the case for further administrative proceedings. See Ghanim v. Colvin, - F.3d -, 2014 WL 4056530, at \*10 (9th Cir. Aug. 18, 2014). In any event, to the extent that Garrison governs the Court’s analysis, the Court finds it distinguishable, as discussed below.

In Garrison, the Ninth Circuit held that the district court should remand to the Commissioner for an award of benefits if the following three conditions are met: (1) the record has been fully developed and further administrative proceedings would serve no useful purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting evidence, whether claimant testimony or medical opinion; and (3) if the improperly discredited evidence were credited as true, the ALJ would be required to find the claimant disabled on remand. See Garrison, 2014 WL 3397218, at \*20. Here, these three conditions have been met: the record has been fully developed, the ALJ failed to provide legally sufficient reasons for rejecting Dr. Boutros’s opinion,

1 and a vocational expert testified that a person who required two unscheduled fifteen  
2 minute breaks (as described in Dr. Boutros's opinion) would not be employable on  
3 a full time basis. (See AR 57.)

4 However, this does not end the Court's inquiry. Even if the three conditions  
5 set out in Garrison are met, the Court still retains the "flexibility to remand for further  
6 proceedings when the record as a whole creates serious doubt as to whether the  
7 claimant is, in fact, disabled within the meaning of the Social Security Act." See  
8 Garrison, 2014 WL 3397218, at \*21 (citing Connett v. Barnhart, 340 F.3d 871 (9th  
9 Cir. 2003)). Here, the Court finds based on the record as a whole that there is serious  
10 doubt as to whether plaintiff was in fact disabled within the meaning of the Social  
11 Security Act as of the date of the ALJ's decision, for the following reasons.

12 First, the probative value of Dr. Boutros's opinion was questionable because  
13 it was premised in part on a condition, plaintiff's hepatitis C, which was untreated.  
14 (See AR 408, 422, 423.) The record reflects that plaintiff had received treatment for  
15 hepatitis C with good results while he was incarcerated. (See AR 213, 224, 225, 227,  
16 229, 247.) The record also reflects that following his release from prison, plaintiff  
17 obtained Medi-Cal coverage (see AR 50), which would presumably allow him to  
18 receive more treatment. To the extent that Dr. Boutros's opinion was issued during  
19 a brief period when plaintiff was untreated, the opinion would not present a true  
20 picture of plaintiff's limitations. See Warre v. Commissioner of Social Sec. Admin.,  
21 439 F.3d 1001, 1006 (9th Cir. 2006) ("Impairments that can be controlled effectively  
22 with medication are not disabling for the purpose of determining eligibility for SSI  
23 benefits.").

24 Second, the record contains no other medical opinion consistent with Dr.  
25 Boutros's opinion. Rather, all of the other physicians who treated or examined  
26 plaintiff or reviewed his records issued findings consistent with the ALJ's conclusion  
27 that plaintiff could work. Specifically, Dr. Cruz, an examining physician, opined that  
28 plaintiff could perform medium work with no functional limitations. (See AR 289-

94.) Dr. Shearer, an examining ophthalmologist, diagnosed bilateral cataracts and measured plaintiff's corrected vision at 20/100 bilaterally, findings which were incorporated in the ALJ's RFC determination. (See AR 181-82.) Dr. Kalmar and Dr. Hartman, state agency review physicians, each opined that plaintiff could perform medium work with some visual and environmental limitations. (See AR 297-305, 334-41.) Prison treatment records repeatedly stated that plaintiff was "stable" or "doing well" with no complaints. (See AR 195, 225, 227, 229, 247.)

Third, the record reflects that plaintiff performed substantial gainful activity during a period of his incarceration in which he alleged he was disabled. (See AR 30.)

Fourth, the factual differences between Garrison and this case also militate in favor of the Court availing itself of its "flexibility" to remand the case for further proceedings. In Garrison, the ALJ committed "a variety of egregious and important errors" by failing to provide legally sufficient reasons for rejecting the claimant's testimony and the opinions of her treating and examining physicians. See Garrison, 2014 WL 3397218, at \*14-\*19. Here, the ALJ's only error was his failure to articulate legally sufficient reasons for rejecting a treating medical opinion that was not well-supported by the record. In Garrison, a review of the record revealed "nothing that would create doubt as to Garrison's entitlement to the benefits she seeks" and only a "bare handful of records showing slight improvement in Garrison's condition." See id. at \*22. Here, as detailed above, almost all of the medical evidence was consistent with the ALJ's determination that plaintiff was not disabled.

Therefore, based on its review and consideration of the entire record, the Court has concluded on balance that a remand for further administrative proceedings pursuant to Sentence Four of 42 U.S.C. § 405(g) is warranted here. Accordingly, IT

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1 IS HEREBY ORDERED that Judgment be entered reversing the decision of the  
2 Commissioner of Social Security and remanding this matter for further administrative  
3 proceedings.<sup>7</sup>

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5 DATED: September 17, 2014

A handwritten signature in dark ink, appearing to read "Robert N. Block", is written over a light-colored rectangular background.

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8 ROBERT N. BLOCK  
UNITED STATES MAGISTRATE JUDGE  
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28 <sup>7</sup> Other than the limitation imposed in Section I regarding the relevant time  
period, it is not the Court's intent to limit the scope of the remand.